

STATE OF MICHIGAN  
IN THE SUPREME COURT

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JOSEPH and THEODORA STAMPLIS,

Plaintiffs-Appellees,

vs.

ST. JOHN HEALTH SYSTEM, d/b/a RIVER  
DISTRICT HOSPITAL,

Defendants-Appellant,

and

G. PHILLIP DOUGLASS, D.O., Jointly and  
Severally, HENRY FORD HEALTH SYSTEMS,  
d/b/a HENRY FORD HOSPITAL,

Defendants.

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BRIEF OF AMICUS CURIAE MICHIGAN  
TRIAL LAWYERS ASSOCIATION

EXHIBIT

CERTIFICATE OF SERVICE

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Supreme Court Docket  
No. 126980

Court of Appeals Docket  
No: 241801

Lower Court (St. Clair  
Cty.) No: K01-1051-NH

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## STATEMENT OF QUESTIONS PRESENTED

- I. BY THE 1995 AMENDMENT OF MCLA 600.2925d, DID THE LEGISLATURE ABROGATE THE COMMON LAW RULE, AS ANNOUNCED IN *THEOPHELIS v LANSING GENERAL HOSPITAL*, 430 MICH 473 (1988), AND SHOULD THIS COURT RESPECT AND APPLY MCLA 600.292d IN ITS CURRENT FORM, AND IN ACCORD WITH ITS PLAIN LANGUAGE, BY WHICH DISMISSAL OF CLAIMS AGAINST AN AGENT-DOCTOR DOES NOT HAVE THE UNIN-TENDED EFFECT OF DISMISSING CLAIMS AGAINST A PRINCIPAL-HOSPITAL?

Plaintiffs-Appellees answer “YES”.

Amicus MTLA answers “YES”.

- B. DOES THE AMENDMENT TO MCLA 600.2925d, CONSTRUED AND APPLIED IN ACCORD WITH ITS PLAIN MEANING, PRESERVE PLAINTIFF’S CAUSE OF ACTION AGAINST THE HOSPITAL?

Plaintiffs-Appellees answer “YES”.

Amicus MTLA answers “YES”.

- C. DOES THE STATUTE CREATE ANY EXCEPTION WHEN THE AGREEMENT IS EMBODIED IN AN ORDER DISMISSING THE CASE AGAINST THE PRINCIPAL WITH PREJUDICE?

Plaintiffs-Appellees answers “NO”.

Amicus MTLA answers “NO”.

D. DO THE ARGUMENTS OFFERED BY  
DR. DOUGLASS PERMIT OR REQUIRE  
DEVIATION FROM THE LANGUAGE OF  
MCLA 600.2925d, AS AMENDED?

Plaintiffs-Appellees answer “NO”.

Amicus MTLA answers “NO”.

## STATEMENT OF FACTS

The underlying facts are explained in the Briefs of the parties. For present purposes, a short summary of those facts which frame the issue will suffice.

This is a medical malpractice case seeking recovery for the paraplegia suffered by Joseph Stamplis. The case was scheduled for trial in St. Clair County Circuit Court before the Hon. Daniel Kelly. At the time,<sup>1</sup> Henry Ford was a Defendant,<sup>2</sup> as were River District Hospital and Dr. Douglass. In pertinent part, Plaintiff alleged that Dr. Douglass breached the standard of care, and that he did so as an agent of River District Hospital, which was vicariously liable for the medical negligence of its agent-doctor.

On the day trial was to begin, there were extensive settlement discussions. Plaintiff offered to accept \$4,300,000 in settlement of all claims and the Hospital offered \$300,000 (Tr. 4/16/02, p. 10; 36aa)<sup>3</sup>. Dr. Douglass offered nothing (*Id.*, p. 9; 35aa ).

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<sup>1</sup>There had been pre-trial settlements with others who had initially been Defendants.

<sup>2</sup>On the eve of trial, amidst the controversy which is at the core of this appeal, Plaintiff and Henry Ford settled their differences.

<sup>3</sup>As seems self-evident, if there has been any intent to dismiss claims against the Hospital, Plaintiff would have accepted the \$300,000 .

Dr. Douglass and Plaintiff then agreed that the doctor would be dismissed as a named defendant, but would remain to testify (Tr. 4/16/02, p. 9; 35aa). When that agreement was placed on the record, Plaintiff's counsel repeatedly stated, without contradiction by counsel for Dr. Douglass or the Hospital, that the dismissal of Dr. Douglass as a named defendant would permit Plaintiff to continue the suit against the Hospital (Tr. 4/16/02, pp. 9, 10; Tr. 4/17/02, pp. 11-14, 18, 23; 35aa, 36aa, 60aa-63aa, 67aa, 72aa). The trial judge would later confirm his understanding that this was the intent (Tr. 4/17/02, pp. 27, 32, 35; 76aa, 81aa, 84aa).

Following entry of an order dismissing the suit against Dr. Douglass with prejudice (26aa), counsel for River District Hospital sought summary disposition,<sup>4</sup> contending that the dismissal of Dr. Douglass barred all claims against the Hospital. Ultimately, the trial judge granted that motion, ruling, in substance, that while dismissal of the Hospital was not intended, the dismissal of Dr. Douglass had that effect by operation of law.

On appeal, the Court of Appeals reversed. By Order of January 27, 2006 (1aa-2aa), this Court granted leave. By that Order, the Court directed the parties to,

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<sup>4</sup>On the day of the settlement, the Hospital's counsel indicated that summary disposition would be sought, and the motion was argued the following day. This provided far less time for Plaintiff to prepare a response than the ordinary 21 day period of **MCR 2.116(G)(1)**.

“include among the issue briefed the impact, if any, of the 1995 amendment of MCLA 600.2925d on the current viability of *Theophelis v Lansing General Hospital*, 430 Mich 473 (1988).” Amicus MTLA submits this Brief to address that question.<sup>5</sup>

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<sup>5</sup>Amicus submits that MCLA 600.2925d, as amended in 1995 in response to *Theophelis*, construed and applied in accord with its plain language, requires the result reached by the Court of Appeals. This being so, the alternative basis for upholding the decision below may be invoked by the Plaintiff in this Court without a cross appeal. *Middlebrooks v Wayne County*, 446 Mich 151, 166, fn. 41; NW2d (1994); *Burns v Rodman*, 342 Mich 410, 414; NW2d (1955). Accordingly, Amicus addresses only the impact of MCLA 600.2924d, while noting that the other arguments offered by Plaintiff would prevail in the absence of the 1995 amendment to MCLA 600.2925d.

## ARGUMENT

I. BY THE 1995 AMENDMENT OF MCLA 600.2925d, THE LEGISLATURE ABROGATED THE COMMON LAW RULE, AS ANNOUNCED SEVEN YEARS BEFORE IN *THEOPHELIS v LANSING GENERAL HOSPITAL*, 430 MICH 473 (1988), AND THIS COURT SHOULD RESPECT AND APPLY MCLA 600.2925d IN ITS CURRENT FORM, AND IN ACCORD WITH ITS PLAIN LANGUAGE, BY WHICH DISMISSAL OF CLAIMS AGAINST AN AGENT-DOCTOR DOES NOT HAVE THE UN-INTENDED EFFECT OF DISMISSING CLAIMS AGAINST A PRINCIPAL-HOSPITAL

A. THE HISTORY LEADING UP TO THE 1995 AMENDMENT TO MCLA 600.2925d

(1) The Background Leading Up To *Theophelis*

Historically, the effect of a release or other agreed upon disposition of claims has been viewed as a matter of contract. Under that view, a settlement or release has no greater effect than that intended by the parties to the agreement. *Harris v Lapeer Public School System*, 114 Mich App 107, 115; 318 NW2d 621 (1982); *Jaffa v Shachot*, 114 Mich App 626, 637; 319 NW2d 604 (1982); *Grzekik v Kerr*, 91 Mich App 482, 486; 283 NW2d 654 (1979).

Here, there is no real dispute<sup>6</sup> that the intent of the agreement between Plaintiff and Dr. Douglass, through their respective counsel, was to discontinue the pursuit of the doctor as a named Defendant, while preserving Plaintiff's claims against the Hospital. Under a contractual paradigm, the parties would be entitled to agree in this fashion, and there would be no basis for imposing a consequence which was not intended. See, *e.g.* *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924) (“The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties”); *Stark v Budworder, Inc*, 25 Mich App 305, 313; 181 NW2d (1970).

(2) The *Theophelis* Decision

In *Theophelis v Lansing General Hospital*, 430 Mich 473, 480; 424 NW2d 478 (1988), the Court considered whether a settlement and release with a

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<sup>6</sup>If there was no “meeting of the minds” on this critical point, there could be no enforceable contract to settle in the first instance, and Plaintiff would be entitled to relief on alternative grounds. See *Vickers v St. John Hospital*, 1998 Mich App LEXIS 1330 (Ct. of App. # 196365, *per curiam opinion* rel'd 4/14/98) (Ex. A) (“There was sufficient uncertainty regarding the intended terms of the oral settlement, as placed on the record, to require that the trial court, when questions arose regarding the intended meaning of the agreement shortly after it was placed on the record, declare that the purported agreement failed for a lack of meeting of the minds, and leave the parties to further negotiations or trial”). *Kamalnath v Mercy Memorial Hospital*, 194 Mich App 543, 549; 487 NW2d 499 (1992) (“In order to form a valid contract, there must be a meeting of the minds on all of the material facts”); *Fisk v Fisk*, 328 Mich 570, 573; 44 NW2d 184 (1950).

nurse and doctor<sup>7</sup> which, by its terms, was not intended to release others, nonetheless had the legal effect of releasing claims against the hospital. The lead opinion of Justice Griffin, in which Justices Brickley and Riley concurred, drew a critical distinction based on the form of the settlement. The Griffin Opinion recited the “common law” doctrine that, “a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability, even though the release specifically reserves claims against the principal”<sup>8</sup> (430 Mich at 480). In contrast, as that Opinion noted, “at common law a covenant not to sue given to an agent did not discharge his principal” (430 Mich at 492).<sup>9</sup> Regarding the document in that case

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<sup>7</sup>In *Theophelis*, unlike this case, the individuals made settlement payments (430 Mich at 477).

<sup>8</sup>In *Theophelis*, Judge Griffin cited *Gieb v Slater*, 320 Mich 316; 31 NW2d 65 (1948) as the foundation of this doctrine. *Geib* was a case involving statutory liability under the Owner’s Liability Statute, a factor stressed by the *Geib* Court (316 Mich at 320). The passage from *Geib* relied on by the Griffin Opinion cited no supporting case law (316 Mich at 321):

“By the great weight of authority, a valid release of either the master or servant from liability for tort operates to release the other. See annotation, 126 A.L.R. 1199, and cases there cited.”

*Gieb* has been overruled in characterizing the Owner Liability Act as based on *respondeat superior*. See *Moore v Palmer*, 350 Mich 363, 394; 86 NW2d 585 (1957).

<sup>9</sup>The basis for the view that a “covenant not to sue” has no preclusive effect is the need to enforce the actual intent of the parties. *Boucher v Thomsen*, 328 Mich 312, 321-322; 43 NW2d 866 (1950). The prospect that the vicariously liable party might seek indemnity (continued...)

as a “release” rather than a “covenant not to sue”, Justices Griffin, Brickley, and Riley concluded that suit against the hospital was barred under these “common law” doctrines. Justice Boyle concurred with this view of the “common law”, although she was unable to definitively decide whether the settlement document was a “release” or a “covenant not to sue”.<sup>10</sup>

Justices Levin, Archer and Cavanagh took issue with a “common law” view that would make the form of the settlement document (“release” or “covenant not to sue”) outcome-determinative. In their view, unless the settlement agreement provided otherwise, there was no release of others who might be responsible, regardless of whether the settlement or dismissal was styled “release” or “covenant not to sue” (430 Mich at 499).

With the construction of “common law” which prevailed under the Griffin Opinion in *Theophelis*, the issue then presented was whether MCLA 600.2925d, in the 1988 form considered in *Theophelis*, abrogated the “common law”. Implicitly recognizing the prerogative of the Legislature to modify the common law, the

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<sup>9</sup>(...continued)  
from the active tortfeasor does not preclude a settlement preserving the claims against the non-settling principal (*Boucher*, 328 Mich at 322).

<sup>10</sup>Ultimately, the view of Justice Boyle carried the day, as Justices Levin, Archer and Cavanagh agreed that the case should be remanded to determine the character of the settlement.

*Theophelis* Court turned to the language of **MCLA 600.2925d** to determine whether it had that effect. In the form then applicable, **MCLA 600.2925d** provided (**430 Mich at 481**):

“When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons *liable in tort* for the same injury or the same wrongful death:

(a) It does not discharge any of the *other tortfeasors* from liability for the injury or wrongful death unless its terms so provide.  
[Emphasis in *Theophelis*”

Seizing on the underscored phrase “other tortfeasors”, the *Theophelis* Court rejected the contention that a principal liable under *respondent superior* was a “tortfeasor”. In its view, “The principal, having committed no tortious act, is not a ‘torfeasor’ as that term is commonly defined” (**430 Mich at 483**). Since the principal was not a “tortfeasor”, reasoned the Court, the Legislature, by using that term to define those “not discharge[d]”, did not intend to permit suit to go forward after release of the agent (**430 Mich at 487-488**).

The Griffin Opinion went on to point out how the Legislature could accomplish the result urged by the plaintiff in *Theophelis* (**430 Mich at 487-488**):

“...[T]he Legislature has never expressed an intent to make the change in law contended for by plaintiffs in this case. Obviously, the Legislature could easily have accomplished

such a purpose by defining the word ‘tortfeasor’ as used in the act to include one who, though guilty of no wrong, is vicariously liable for the tort of another. Instead, the Legislature chose in its 1961 and 1974 versions to eliminate altogether a definition of ‘joint tortfeasor’ which had been included in the 1941 act.”

In short, the outcome in *Theophelis* turned on the Legislature’s use of the term “tortfeasor” in **MCLA 600.2925d** to describe those whose liability is “not discharge[d]”. As *Theophelis* made clear, the Legislature could allow the Plaintiff and agent to preserve a cause of action against the principal by using a term other than “tortfeasor” to describe those against whom the plaintiff could proceed in the absence of an express agreement otherwise.

### (3) The Practical Consequences Of *Theophelis*

One effect of *Theophelis* was to make the form of the settlement or dismissal - - “release” or “covenant” - - critical to the maintainability of suit against the principal. In the view of some, this was largely a distinction without a difference, exalting form over substance, and creating a trap for the unwary. See *Cook v City Transport Corp*, 272 Mich 91, 92-93; 261 NW 257 (1935); *Theophelis*, 430 Mich at 503, 505 (Levin, J., dissenting, citing **Restatement, Torts, 2d**)

Another consequence of *Theophelis* was that it prohibited settling parties

from negotiating a release of the agent while preserving claims against the principal. This consequence clashes with the Michigan policy of encouraging settlements. *Brewer v Payless Stations, Inc*, 412 Mich 673, 679; 316 NW2d 702 (1982); *People v Gill*, 247 Mich 479; 226 NW 214 (1929); *Jackson v Barton-Malow Co*, 131 Mich App 719, 722-723; 346 NW2d 591 (1984). It also restricts the freedom of contract, a freedom which this Court recently extolled in *Rory v Continental Insurance Co*, 473 Mich 457, 468-470; 703 NW2d 23 (2005).

The practical consequences of the *Theophelis* approach were particularly acute in modern malpractice cases where the medical error was committed by a doctor who was an agent, or ostensible agent, of a hospital. In that context, there are several practical reasons why the parties might wish to agree to dismiss the doctor as a named defendant while allowing suit against the hospital to proceed.

The financial impact of medical negligence can be staggering, greatly exceeding the \$200,000 in insurance typically carried by Michigan doctors. In practice, then, the principal-hospital will bear the financial risk of a judgment for the plaintiff, especially since, in medical malpractice cases, liability is joint and several, where, as here, there is no claim that the patient was negligent. MCLA 600.6304(6)(a); *Salter v Patton*, 261 Mich App 559, 569; 682 NW2d 537

(2004).

Moreover, under 42 USC § 11131(a) and MCLA 500.2477c(3), judgments or settlements against an individual doctor must be reported to the Insurance Commissioner and National Practitioner Data Bank. Hospitals, seeking to attract and retain physicians, have their own business reasons for attempting to protect their staff doctors from the prospect of personal liability and the reporting requirements of state and federal statutes.

For these reasons, all parties to medical malpractice litigation may find it advantageous for the plaintiff to release claims against an individual doctor directly without forfeiting the cause of action against the hospital. The *Theophelis* approach impaired the ability to resolve part of the case in this fashion. In practice, then, the *Theophelis* approach virtually compelled a plaintiff to retain an individual doctor as a party defendant to avoid the risk of inadvertently forfeiting a meritorious cause of action against the hospital.

**B. THE 1995 AMENDMENT TO MCLA 600.2925d, CONSTRUED AND APPLIED IN ACCORD WITH ITS PLAIN MEANING, PRESERVES PLAINTIFF'S CAUSE OF ACTION AGAINST THE HOSPITAL**

(1) The Legislative Response to *Theophelis*

Presumably cognizant of these consequences of the *Theophelis* approach, the Legislature amended MCLA 600.2925d by Public Act 1995, No. 161, effective September 1, 1995. That amendment brought the statute to the form applicable to this case. Accepting the invitation of the Griffin Opinion in *Theophelis*, the Legislature removed the term “tortfeasor” as a limitation on the class whose liability was preserved. With the amendment, MCLA 600.2925d now reads:

**“If a release or a covenant not to sue or not to enforce judgment is given in** good faith to 1 of 2 or more persons for the same injury or the same wrongful death, both of the following apply:

(a) **The release or covenant does not discharge 1 or more of the other persons from liability for the injury or wrongful death unless its terms so provide.**

(b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death.” (emphasis supplied)

Comparing the language of subsection (a) to that of the earlier version construed in *Theophelis*, the critical change is apparent. The earlier version allowed settling parties to preserve claims against “other tortfeasors” (construed in *Theophelis* as meaning only those actively negligent, not principals vicariously liable). The amended version allowed preservation of claims against “the other persons” who may

be legally liable, without regard to the nature of that liability. Under the amendatory language, a “release” and “covenant” alike preserves claims, unless explicitly released, against “other persons”. So long as one falls within the “other persons” class (not the more narrow “tortfeasors” class of the earlier version construed in *Theophelis*), liability is not extinguished by the release of another.

(2) Principles For Construing And  
Applying A Statute

As this Court has often stressed, where legislative language is clear, the judicial duty is to apply the literal language, regardless of how wise the legislation may seem. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); *Mudel v Great A & P Tea Co*, 461 Mich 691, 706; 614 NW2d 207 (2000); *Scarsella v Pollak*, 462 Mich 547, 555; 607 NW2d 711 (2000).

To parse the statutory phrases, the triggering language of **MCLA 600.2925d** provides, “If a release or a covenant not to sue or not to enforce a judgment is given in good faith to one of 2 or more persons for the same . . .”. That triggering clause is plainly satisfied. While there may be some dispute about the technical nature of the agreement not to pursue the suit against Dr. Douglass, it was either a “release” or “covenant”. It was given to one person (Douglass) of two or

more (The Hospital being the other) liable for the injury. Since the triggering language is satisfied, subsection (a) applies:

“The release or covenant does not discharge 1 or more of the other persons from liability for the injury or wrongful death unless the terms so provide.”

The “unless . . .” clause does not come into play. Neither the agreement as placed on the record nor the order which purported to embody that agreement provides for dismissal of the claims against the Hospital.

The remaining language states that, “the release or covenant does not discharge 1 or more of the other persons from liability”. The term “person” is defined in **MCLA 8.3i** to include a corporation like the Hospital:

“The word ‘person’ may extend and be applied to bodies politic and corporate, as well as to individuals.”

One can readily plug the names of Dr. Douglass and the Hospital into the language of **MCLA 600.2925d**:

“The release or covenant [given to Dr. Douglass] does not discharge [the Hospital] 1 or more of the other persons from liability”.

In short, **MCLA 600.2925d**, enacted in response to *Theophelis*, adopts the contractual paradigm in dealing with the effect of releasing of multiple parties. Unless the settlement explicitly so provides, the release of an agent (“one of two or

more persons”) does not release any other person, including the principal (“does not discharge one or more other persons”).

The Legislature may, of course, adopt amendatory legislation in response to judicial decisions. It has done so by amending **MCLA 600.2925d** in response to *Theophelis*. Where this occurs, the judiciary is to respect and apply the amendatory legislation. See, *e.g.* *In re Certified Question [Karl v Bryant Air Conditioning]*, 416 Mich 558; 331 NW2d 456 (1982); *McDougall v Schantz*, 461 Mich 15; 597 NW2d 148 (1999). It should do so here by applying the plain statutory language by which the dismissal of Dr. Douglass “does not discharge” the Hospital.

**C. THE STATUTE DOES NOT CREATE  
ANY EXCEPTION WHEN THE  
AGREEMENT IS EMBODIED IN AN  
ORDER DISMISSING THE CASE  
AGAINST THE PRINCIPAL WITH  
PREJUDICE**

The Hospital prevailed in the trial court by invoking the doctrine of *res judicata*. It seemingly argues that, because the “release” or “covenant” was memorialized in a dismissal order, the Hospital is freed of liability under judge-made *res judicata* principles notwithstanding **MCLA 600.2925d**. There are several reasons why this analysis must fail.

First, that approach regards the order as something different than the

written embodiment of an agreement of the parties which, by its own terms, was intended not to dismiss the Hospital. It is not. The order expresses no independent judicial determination whether the doctor did or did not violate the standard of care. Instead, the order accomplishes no more or less than the agreement it purports to embody. As in *Larkin v Otsego Memorial Hospital*, 207 Mich App 391; 525 NW2d 475 (1994) and *Boucher v Thomsen*, 328 Mich 312; 43 NW2d 866 (1950), an agreement by which claims against the principal are preserved does not magically have the opposite effect just because it is memorialized in an order dismissing the case against the agent with prejudice. Even under the common law principles pre-dating the 1995 amendment of MCLA 600.2925d, an order dismissing the agent with prejudice does not, by *res judicata*, release the principal where the dismissal order simply memorializes an agreement by which the parties intend to preserve the claim against the principal. *Larkin, supra; Boucher, supra.*

Second, *res judicata* applies only where “there has been a prior decision on the merits”. *Paige v City of Sterling Heights*, \_\_\_ Mich \_\_\_; 720 NW2d 219 (2006); *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002). The plain purpose and effect of the dismissal was to avoid a decision on the merits of the issue whether the doctor breached the standard of care, as between Plaintiff and the

doctor. It is a gross perversion of logic to characterize as a decision “on the merits” an agreement and order which avoided exactly that.

Third, even if the judge-made “common law” of *res judicata* resulted in the unintended dismissal of the principal under these circumstances, the fact remains that the Legislature has spoken to the issue in **MCLA 600.2925d**. It is, of course, the prerogative of the Legislature to pass amendatory legislation to accomplish a result different than the “common law” or earlier case law. See *Karl, supra; McDougall, supra*. Since the Legislature has done so, the role of the judiciary is to apply the amendatory statute, even if the common law result in the absence of the statute would have been different.

Here, the agreement of the parties (and the order based on it) were intended to dismiss the claims against Dr. Douglass only. They were not intended to release the claims against the Hospital-principal, and, in the language of **MCLA 600.2925d**, “its terms [did not] so provide”. Under the amendatory statute, they did “not discharge ‘1 or more other persons’ (the Hospital) from liability.” The statute should be followed, even if a different result would follow under common law *res judicata* principles in the absence of the statute.

Fourth, the statutory language contains no exception when the release or

covenant results in an order dismissing the agent with prejudice.<sup>11</sup> Once suit has been filed, the necessary procedure for implementing a “release” or “covenant” is an order dismissing the case against the agent. The dismissal is typically “with prejudice”, expressing the agreement that the plaintiff will not file a later suit against the doctor. To create a judge-made “*res judicata*” exception to **MCLA 600.2925d** would render the 1995 amendment itself meaningless. The Hospital’s argument runs afoul of the settled principle that a court cannot create judge-made exceptions or limitations which the drafters decided not to include. *In re Hurd-Marvin Drain*, 331 Mich 504, 504; 50 NW2d 143 (1951); *Ford Motor Co v Unemployment Compensation Commission*, 316 Mich 468, 475; 25 NW2d 586 (1947); *Alexander v MESC*, 4 Mich App 378, 383; 144 NW2d 850 (1963).

Finally, the approach advocated by the Hospital, if followed, would render the amendment to **MCLA 600.2925d** virtually meaningless. A dismissal of this nature, particularly one for which no settlement payment is made, occurs most frequently after suit has been filed against the dismissed party (after all, what would be the point of issuing a release, for no consideration, before filing suit?). If dismissal

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<sup>11</sup>If the Legislature had wanted to, it might have provided that a release of the agent “does not discharge 1 or more the other persons from liability for the injury or wrongful death unless it terms so provide or unless a dismissal with prejudice is entered” or words to that effect. It did not.

of a suit against one defendant in this fashion created a judge-made exception to the “does not discharge” dictates of the statute, then the amendment to MCLA 600.2925d would fail to serve its intended purpose. The Court should reject an interpretation of the statute that would render it virtually nugatory.

**D. THE ARGUMENTS OFFERED BY DR. DOUGLASS DO NOT PERMIT OR REQUIRE DEVIATION FROM THE LANGUAGE OF MCLA 600.2925d, AS AMENDED**

Dr. Douglass suggests that the Hospital should be deemed dismissed because, otherwise, if the Hospital were found liable for his negligence, it could seek indemnification. Whether couched in terms of “public policy” or “statutory construction”, this argument must fail.

**(1) The “Public Policy” Aspect of The Argument**

In part, Dr. Douglass suggests that the dismissal constitutes “exoneration”, and that it is somehow bad “policy” that the case continue against the Hospital. This is so, he argues, because he might be “dragged” back into the case as a witness, or as the target of criticism, and might be sued by the Hospital for indemnity if the Hospital were found liable on the basis of his negligence.

Preliminarily, the dismissal is hardly “exoneration”; it is simply a dismissal,

nothing more and nothing less. It is a disposition by which the Plaintiff dismissed his direct action against the agent, specifically preserving the ability to prove that the agent was negligent, and preserving the ability to seek a judgment against the Hospital-agent for the doctor's medical negligence. Indeed, it is only if he is actually adjudicated negligent - - by a judgment against the Hospital - - that indemnity might be sought. The fiction that dismissal equals "exoneration" hardly supports an argument based on the consequences of an adjudication of actual fault.

To be sure, the doctor may remain peripherally involved in the litigation as a witness or the target of criticism. This is inherently the case in a vicarious liability case, regardless of whether the agent is a party or not.<sup>12</sup> **MCLA 600.2925d**, construed as discussed above, simply places the doctor in the same position as if he had never been sued. His conduct is at issue, and he may be a necessary witness, but the plaintiff is not seeking judgment against him.

This is hardly the unintended consequence of a release of only the agent. Indeed, as placed on the record in this case, the dismissal envisioned Dr. Douglass

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<sup>12</sup>As a matter of law, suit may be maintained against the principal without adding the agent as a co-defendant. See *e.g. Cox v Flint Bd of Hospital Mgrs*, 467 Mich 14; 651 NW2d 356 (2002); *Nippa v Botsford Hospital (On Remand)*, 257 Mich App 387; 668 NW2d 628 (2003). When that occurs, the agent may be a necessary witness. And, his conduct will necessarily be criticized.

remaining to testify with the Plaintiff and the Hospital litigating whether Dr. Douglass was professionally negligent.

It is also true that if the Hospital was found liable for his fault, it might seek indemnity from Dr. Douglass. This is not bad “policy”. It is what this Court held, in *Boucher*, to be no reason to disregard the intent of the agent and Plaintiff. It is the precise result dictated by the Legislature in **MCLA 600.2925a(7)** [which, distinguishing between contribution and indemnity, preserves the common law right of indemnity] and **MCLA 600.2925d(b)** [which relieves the discharged agent of contribution, but not indemnity, liability]. By these statutes, the Legislature has decreed that where an agent like Dr. Douglass is dismissed without an agreement to dismiss others, the principal is not discharged [**MCLA 600.2925d(a)**], the agent is not liable to others for contribution [**MCLA 600.2925d(b)**], but remains liable to others for indemnity [**MCLA 600.2925a(7)**].

The result dictated by the Legislature is, by definition, the “policy” of the State. It is simply not the prerogative of the judiciary to substitute its view of “policy” for that of the Legislature, expressed by the statutory language. *Terrien v Zwit*, 467 Mich 56, 66-68; 648 NW2d 602 (2002); *Grandville Municipal Employees Association v City of Grandville*, 453 Mich 428, 435; 553 NW2d 917

(1996).

This is not to suggest that the legislative scheme is bad “policy”. By settling in this fashion, Dr. Douglass was spared the immediate risk of a liability finding and was permanently spared the risk of being held liable to the plaintiff (with the possibility that his personal assets would be subjected to the collection efforts of his victim). Even with a finding of liability by the Hospital, for his negligence, he could hope that the Hospital would not pursue an indemnity claim, perhaps because of its desire to be an attractive place for doctors to practice. While Plaintiff did not, and could not, give up the Hospital’s indemnity rights under **MCLA 600.2925a(7)**, Dr. Douglass still received a genuine benefit from a release which, per **MCLA 600.2925d**, preserved Plaintiff’s claim against the Hospital-principal.

If Dr. Douglass preferred to take his chances against the Plaintiff rather than the Hospital, he could have done so. He could simply have refused to agree to a settlement which preserved Plaintiff’s claims against the Hospital.

At bottom, the 1995 amendment to **MCLA 600.1915d** allows a plaintiff and doctor-agent to agree to a settlement between themselves without the unintended effect of dismissing claims against the principal-hospital, “unless its terms so provide”. That is what happened in this case. There is nothing contrary to Michigan “policy”

about an agreement which accomplishes exactly what the Legislature intended to allow.

(2) The Impact of MCLA 600.2925a(7) And MCLA 600.2925b

Dr. Douglass has invoked **MCLA 600.2925a(7)** and **MCLA 600.2925b** to suggest that **MCLA 600.2925d** is not to be construed to permit a doctor and plaintiff to negotiate a release which preserves vicarious liability claims against the hospital. This argument misses the point entirely.

The pertinent principles are discussed in subsection B above. In construing statutes together, they must be viewed harmoniously, in a way that renders neither nugatory. *Dussia v Monroe County Employees Retirement System*, 386 Mich 244, 248; 191 NW2d 307 (1971); *World Book, Inc v Revenue Division*, 459 Mich 403, 416-417; 590 NW2d 293 (1999); *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). Under these principles, **MCLA 600.2925a(7)** and **MCLA 600.2925b** do not detract from **MCLA 600.2925d** and its dictate that the release of an agent does not release the principal.

In pertinent part, **MCLA 600.2925a(7)** provides:

“This section does not impair any right of indemnity under existing law. Where 1 tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution from the obligee for any

portion of his indemnity obligation.”

This statute simply preserves the Hospital’s right to seek indemnity from Dr. Douglass if it is held vicariously liable for his negligence. That section is not at all inconsistent with **MCLA 600.2925d**, by which Plaintiff’s claim against the Hospital is preserved. Indeed, **MCLA 600.2925a(7)** supports Plaintiff’s construction of **MCLA 600.2925d**, as preservation of indemnity rights in **MCLA 600.2925a(7)** presupposes a judgment against the Hospital, not dismissal of the Hospital without a trial.

Nor does **MCLA 600.2925d(b)**, which addresses contribution between tortfeasors, undermine the impact of the 1995 amendment to **MCLA 600.2925d**. In full, **MCLA 600.2925b** states:

“Except as otherwise provided by law, in determining the pro rata shares of tortfeasors in the entire liability as between themselves only and without affecting the rights of the injured party to a joint and several judgment:

- (a) Their relative degrees of fault shall be construed.
- (b) If equity requires, the collective liability of some as a group shall constitute a single share.
- (c) Principles of equity applicable to contribution generally shall apply.” (emphasis supplied)

This provision addresses only the allocation of fault between “tortfeasors”. It can have no application to the instant case because, as *Theophelis*

teaches, the Hospital is not a “tortfeasor”. The phrase “tortfeasors . . . between themselves” envisions multiple parties actively at fault and cannot apply to the principal-agent setting when, per *Theophelis*, the agent is the sole “tortfeasor”.

Moreover, this provisions addresses the allocation of liability between actively liable parties. While it may have contribution consequences in non-malpractice cases,<sup>13</sup> it has no application to the indemnity rights which a vicariously liable principal may have against an actively negligent agent.

In sum, the 1995 amendment to **MCLA 600.2925d** reflects the Legislature’s reaction to *Theophelis*. By the express language of the amendment, a release by an agent “does not discharge” the principal (“1 or more of the other persons”) “unless its terms so provide”. The plain statutory language creates no exception when the release is implemented by a dismissal with prejudice. Nor is the meaning of **MCLA 600.2925d** changed by “policy”, or by **MCLA 600.2925a(7)**, or by **MCLA 600.2925b**. Instead, the **MCLA 600.2925d** should be construed and applied according to its terms.


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<sup>13</sup>In malpractice cases like this, where there is no fault by the Plaintiff, and where one defendant makes a settlement payment, there is no allocation of fault. Instead, the non-settlor received a credit for the settlement payment of others but remains liable for the excess, *Markley v Oak Health Care*, 255 Mich App 245; 660 NW2d 344 (2003). And, the joint and several liability extends to the fault of others, who are not, or are no longer, defendants. *Bell v Ren-Pharm, Inc*, 269 Mich App 464; 713 NW2d 285 (2006).

In the instant case, the settlement between the Plaintiff and Dr. Douglass did not, by “its terms”, release the Hospital. **MCLA 600.2925d** allowed them to agree in this fashion without unintentionally discharging the claims against the Hospital which they explicitly intended to preserve. As the agreement was permissible under **MCLA 600.2925d**, as amended in response to *Theophelis*, and as it “does not discharge” the Hospital by the statutory language, the Court of Appeals correctly reversed the trial court’s summary disposition.

Respectfully submitted,

**MICHIGAN TRIAL LAWYERS  
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Dated: October 27, 2006

STATE OF MICHIGAN  
COURT OF APPEALS

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ANNIE BEATRICE VICKERS, Personal  
Representative of the Estate of DELANSO  
JOHNSON, Deceased,

UNPUBLISHED  
April 14, 1998

Plaintiff-Appellant,

v

ST. JOHN HOSPITAL and  
JOHN E. BOCCACCIO, M.D.,

No. 196365  
Wayne Circuit Court  
LC No. 94-409926 NH

Defendants-Appellees.

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Before: Holbrook, Jr., P.J. and White and R. J. Danhof\*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order enforcing a release and settlement agreement as to defendant, Dr. John Boccaccio, in this medical malpractice action. Plaintiff also challenges the trial court's order granting a directed verdict in favor of defendant, St. John Hospital. We reverse.

I

Plaintiff's son, Delanso Johnson, was admitted to St. John Hospital (the hospital) for treatment of a gunshot wound. He was surgically treated by Dr. Boccaccio and Dr. Leo LaPuerta, but died while in the recovery room. Plaintiff filed this wrongful death action, naming the hospital, and Drs. Boccaccio and LaPuerta as defendants. Plaintiff's complaint alleged that Dr. LaPuerta negligently performed a "Whipple procedure" to repair damage caused by the gunshot wound, that Drs. LaPuerta and Boccaccio negligently failed to consider and perform alternative surgical procedures, and that both doctors prematurely stopped providing blood transfusions to Johnson. Plaintiff sought to hold the hospital vicariously liable for the alleged negligence of Drs. Boccaccio and LaPuerta.

Plaintiff failed to serve Dr. LaPuerta, resulting in his dismissal from the case. The case proceeded against Dr. Boccaccio and the hospital only. On the day scheduled for trial, plaintiff entered

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

into a settlement agreement with Dr. Boccaccio, the terms of which were placed on the record. Plaintiff stated on the record that she was releasing Dr. Boccaccio from any and all claims that she may have against him in exchange for a payment of \$10,000, but was reserving the right to proceed with her cause of action against the hospital. Thereafter, while arguing pretrial motions, a dispute arose regarding the effect of the settlement with Dr. Boccaccio on the hospital's vicarious liability for his alleged negligence. The trial court ruled that the agreement to release Dr. Boccaccio operated to discharge the hospital from vicarious liability for any negligent acts by Dr. Boccaccio, but the hospital could still be held vicariously liable for the negligence of any of its other agents or employees, specifically, Dr. LaPuerta.

During opening statement, plaintiff's counsel advanced three theories of malpractice: (1) that Dr. LaPuerta's decision to perform a Whipple procedure, instead of simply over-sewing the bullet hole, constituted malpractice; (2) that Dr. LaPuerta negligently performed the Whipple procedure; and (3) that the decision to terminate blood transfusions was premature and, therefore, negligent.

Midway through trial, before plaintiff finished presenting her case, the hospital moved for a directed verdict. The hospital noted that plaintiff intended to call only two witnesses with regard to the issue of liability; Dr. Peter Tieman, who participated in the surgery, through his de bene esse deposition, and plaintiff's expert, Dr. Bussey. The hospital argued that a directed verdict was appropriate because, viewed most favorably to plaintiff, Dr. Tieman's testimony would show that both the decision to perform the Whipple procedure and the decision to stop the blood transfusions were made by Dr. Boccaccio, for whom the hospital could not be held vicariously liable. The hospital further argued that plaintiff should not be permitted to proceed under a theory that Dr. LaPuerta negligently performed the Whipple procedure because that theory was never mentioned by Dr. Bussey in his discovery deposition. The hospital also argued that plaintiff could not prevail under such a theory in any event because the undisputed evidence established that Dr. Boccaccio was the surgeon in charge and, as such, he had a non-delegable duty to see that the surgery was performed with due care. After hearing further arguments, the trial court granted defendant's motion for a directed verdict, explaining:

It's a legal question and that's what it comes down to.

I have an expert, Dr. Bussey, who specifically states the two breaches of the standard of care are the decision to do the Whipple procedure, under the circumstances of the case and the decision to stop that. Now, your own witness then goes on to make it very clear that Dr. LaPuerta did not make the decision to do the surgery, nor to stop the transfusion. In fact, his testimony is just the opposite. It was clear from everything in here that Dr. Boccaccio made the decision as to the surgery and Dr. LaPuerta proceeded to do the surgery.

And I think in light of this case offered by the Defendant at 408 Mich 248, which is a Supreme Court case, that the doctor is in charge of the operation and it is a non-delegable duty to see that the operation was performed with due care. I think – I don't think that you have legally – I don't think legally you will be able to establish your proximate cause and, therefore, the motion is granted.

Following the directed verdict, plaintiff refused to consent to an order dismissing Dr. Boccaccio. Dr. Boccaccio filed a motion to enforce the terms of the release and settlement agreement. The trial court subsequently entered an order dismissing Dr. Boccaccio pursuant to the release and settlement agreement that was placed on the record on the first day of trial. This appeal followed.

## II

Plaintiff argues that the trial court erred in ruling that there was a valid release of Dr. Boccaccio and settlement of plaintiff's claims against him, and that the hospital's vicarious liability through Dr. Boccaccio was thereby extinguished. Plaintiff alternatively argues that if this Court does not set aside the release, it should reform it to constitute a covenant not to sue.

Although we agree that the trial court properly declined to enforce the settlement agreement as a covenant not to sue, we conclude that under the circumstances presented here, the settlement agreement should not have been enforced as a release. There was sufficient uncertainty regarding the intended terms of the oral settlement, as placed on the record,<sup>1</sup> to require that the trial court, when questions arose regarding the intended meaning of the agreement shortly after it was placed on the record,<sup>2</sup> declare that the purported agreement failed for lack of a meeting of the minds, and leave the parties to further negotiations or trial.<sup>3</sup> This is especially so where the same attorney was representing the doctor and the hospital.

Accordingly, we vacate the trial court's order enforcing the release and settlement agreement.

## III

Plaintiff also argues that the trial court erred in granting a directed verdict in favor of the hospital. We agree.

A trial court's decision to grant a directed verdict is reviewed de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). This Court must view the testimony and all legitimate inferences drawn therefrom in a light most favorable to the nonmoving party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds could differ. If reasonable minds could differ, a directed verdict is inappropriate. *Brisboy v Fibreboard Corp*, 429 Mich 540, 549; 418 NW2d 650 (1988).

The trial court directed a verdict on plaintiff's theory that the decision to perform a Whipple procedure, rather than over-sew the bullet hole, constituted malpractice on the basis of the court's factual determination, upon review of Dr. Tiernan's de bene esse deposition, that Dr. LaPuerta did not make the decision to do the surgery and that Dr. Boccaccio made the decision. However, reasonable minds could differ with regard to whether Dr. LaPuerta made the decision to perform the Whipple procedure.

Dr. Tiernan testified at deposition in pertinent part:

*Q.* After opening the abdominal cavity what was done next in the operative procedure that you can recall, Doctor?

*A.* Well, they moved the greater omentum and did a gingerly search around the small bowel, check the colon, and palpate the stomach to see that the nasogastric tube was in place. But these were not done as thoroughly as I have seen before because Leo [LaPuerta] was sort of like a kid and he squealed, "Oh, boy, a Whipple." And so Leo really, as fast as he could, proceeded to try to perform a Whipple.

\* \* \*

*Q.* And the, I believe, you said – what did he do next after that?

*A.* I think –see, [Dr. LaPuerta] didn't do a real thorough job, that I recall, of inspecting the small bowel. But you would have checked the small bowel to see if there was any injury there and there really wasn't any reason to believe there was. And it, basically, was a halfhearted attempt. I do believe that he checked the stomach to see that there was a nasogastric tube in the right place, maybe checked the colon quickly, but really, I think, he was in a rush to do his Whipple.

*Q.* You believe he just – a cursory examination of these organs and then proceeded to a Whipple.

*A.* Yeah. I would say halfhearted.

*Q.* You say it was halfhearted because he didn't take the time that he normally would do?

*A.* I say that because he exclaimed, "Oh, boy, a Whipple. Let's do a Whipple."

\* \* \*

*Q.* Okay, I understand. At that point in time did you know the reason why he thought a Whipple would be done, medical reason why?

*A.* At the time I really couldn't understand it and I did propose, "Well, you know, you could just over sew the bullet holes and just check for injuries." And [Dr. LaPuerta] said, "No. We are doing a Whipple. We've got duodenal trauma, we're doing a Whipple."

*Q.* It's your understanding he was doing a Whipple because of the trauma to the duodenum in the second and third portions?

A. Yeah. That's what he said.

\* \* \*

Q. As a third year resident at the time did you think there was a massive injury – third or fourth year, however you classified yourself, did you think there was a massive injury to the duodenum.

A. No. In fact, I explained to him – I suggested that he just over sew the bullet holes. Actually, I just recalled something a little bit later. There was another possible motive for Leo to do the Whipple and that was it was just it was a person to practice on, it was somebody to practice.

\* \* \*

Q. Did Dr. Boccaccio say anything in response to Dr. LaPuerta's statement that he would do a Whipple?

A. Well, he hesitated and then said, "Yeah, go ahead."

\* \* \*

Q. So at that point in time two people agreed to do it; Boccaccio and LaPuerta, and your suggestion was that they just over sew?

A. Right

\* \* \*

Q. At that point in time had Dr. Boccaccio said anything else other than merely saying, "Go ahead with the Whipple" and later on saying, "Keep going. This is just practice." Did he say anything else?

A. I think at that point he started taking more interest in the case and started looking and trying to be more active, but he didn't really say much more.

Viewed most favorably to plaintiff, reasonable jurors could conclude that Dr. LaPuerta made the decision to perform the Whipple procedure and that Dr. Boccaccio acquiesced in that decision. Accordingly, the trial court erred in granting a directed verdict on the basis of its factual determination that the decision to perform the Whipple procedure was made solely by Dr. Boccaccio.

The trial court also held, relying on *Orozco v Henry Ford Hospital*, 408 Mich 248; 290 NW2d 363 (1980), that Dr. Boccaccio, as the doctor in charge of the operation, had a non-delegable duty to see that the operation was performed with due care and, therefore, as a matter of law Dr. LaPuerta's conduct could not be a proximate cause of damages.

In *Orozco*, the plaintiff presented evidence that one of the doctors performing his operation made the statement, "Oops, I cut in the wrong place." The trial court granted a directed verdict for the defendant, Dr. Ponka, because the plaintiff could not identify which doctor made the admission. The Supreme Court reversed, stating:

Dr. Ponka was in charge of the operation. Even assuming another doctor made the admission, it would not relieve Ponka of responsibility. See *Barnes v Mitchell*, 341 Mich 7; 67 NW2d 208 (1954). He had a non-delegable duty to see that the operation was performed with due care.

While *Orozco* recognizes that a supervisory physician is responsible for the conduct of his or her subordinates, it does not hold that those subordinates are thereby relieved of liability for their own negligence, or that a hospital is relieved of vicarious liability for the negligence of its subordinate agents or employees. Moreover, that a subordinate agent or employee is personally liable for torts in which he actively participates, and conversely, that a principal is vicariously liable for the acts of its employees or agents committed within the scope of the employment or agency relationship, is consistent with general agency principles. *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996); *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986); *Trail Clinic, PC v Bloch*, 114 Mich App 700, 709; 319 NW2d 638 (1982).

Accordingly, we conclude that the trial court erred in dismissing plaintiff's claims that Dr. LaPuerta was negligent and the hospital was vicariously liable on the basis of *Orozco*.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

<sup>1</sup> On March 4, 1996, the date set for trial, plaintiff and Dr. Boccaccio reached a settlement agreement:

THE COURT: This is the time and date set for trial in this case and I understand the parties have reached an agreement as to one of the Defendants, a Dr. Poccaccio [sic]?

[PLAINTIFF'S COUNSEL]: That is correct, your Honor.

THE COURT: And are you ready to place that settlement on the record?

[DEFENSE COUNSEL]: Yes, your Honor.

[Plaintiff's personal representative identified, and oath administered]

THE COURT: Counsel, do you want to place the terms of settlement on the record, please?

[PLAINTIFF'S COUNSEL]: Sure.

#### EXAMINATION

BY [PLAINTIFF'S COUNSEL]

*Q.* Ms. Vickers, you have brought a claim on behalf of the Estate of Delanso Johnson against St. John Hospital and a Dr. John Poccaccio [sic]. Is that correct?

*A.* That's correct.

*Q.* And have you now reached a settlement as to Defendant Dr. John Poccaccio [sic], only?

*A.* Yes, I guess.

*Q.* And are the terms of the settlement that, in exchange for compensation of \$10,000.00 to the Estate, you will dismiss Dr. John Poccaccio [sic] as a Defendant in this case, only?

*A.* Yes.

*Q.* And you still have the right to proceed with your cause of action against the hospital?

*A.* Right, yes.

THE COURT: [Defense counsel] do you have any questions?

[DEFENSE COUNSEL]: Yes.

#### EXAMINATION

*Q.* [DEFENSE COUNSEL]: Ms. Vickers, as the Personal Representative of the Estate, you understand that by releasing -- by settling with Dr. Poccaccio [sic] you are releasing him from any and all liability, or of any and all claims that you or the Estate may or may have had against Dr. Poccaccio [sic]?

A. Yes.

Q. And do you believe that, that releasing Dr. Poccaccio [sic] is in the best interest of the Estate at this time, for the \$10,000.00 ?

A. Yes.

Q. Do you understand that this, once and for all, ends any claims that you may have against Dr. Poccaccio [sic] for the claims of the death of Delanso Johnson?

A. Yes.

[DEFENSE COUNSEL]: I have no further questions.

THE COURT: Do you understand that today is the time and date set for trial and the jury may have awarded you more, less, the same amount, or nothing at all? Do you understand that?

THE WITNESS: M'hm. (AFFIRMATIVE)

THE COURT: You also understand that – well, I want to rephrase that.

[DEFENSE COUNSEL]: Your Honor, I do have one other question.

THE COURT: Go ahead.

#### EXAMINATION

BY [DEFENSE COUNSEL]:

Q. Do you understand that, as I understood it, the terms of the payment of the \$10,000.00 on behalf of Dr. Poccaccio [sic] was included as part of the release agreement, a confidentiality clause ? Do you understand that?

THE COURT: You have no objection to that Counsel, or your client ?

[PLAINTIFF'S COUNSEL]: We're reserving our rights against the hospital, so it's certainly any matters that relate to the claim against the hospital we would not give any –

THE COURT: We're not asking about the hospital, we're just talking about the one defendant.

[DEFENSE COUNSEL]: I'm just talking about just as to the terms of the settlement.

[PLAINTIFF'S COUNSEL]: Right, that's fine.

EXAMINATION BY THE COURT

THE COURT: With the doctor, all right. Do you enter this agreement or settlement freely and voluntarily? No one has coerced you or pushed you into this?

THE WITNESS: No.

THE COURT: All right. I will make a finding that it is in the best interest of the Estate to settle with the one Defendant for the amount of \$10,000.00. Let me place on the record, particularly in view of the fact that there was a \$7,500.00 mediation in this matter.

Before we continue here, I want you to be well aware, as Personal Representative of the Estate, that the hospital has made an offer to resolve the case against them in the amount of \$25,000.00, in addition to the ten, and that I have communicated that offer to your attorneys and that they have told me that you have declined that amount. Is that correct?

THE WITNESS: That is correct.

<sup>2</sup> Following the placement of the settlement on the record, the court addressed the motions in limine. During these discussions, plaintiff's counsel requested certain portions of Dr. Boccaccio's personnel file. The following discussion ensued:

THE COURT: Well, my problem is, I don't know how you're going to get anything from this doctor's file now that he's not a party. I mean, how are you going to get a foundation to even use it?

[PLAINTIFF'S COUNSEL]: Well, respondeat superior. Under – if they're, you know, ostensible agent –

THE COURT: No.

[DEFENSE COUNSEL]: No, they just released the hospital for any actions of Dr. Poccaccio [sic], your Honor.

[PLAINTIFF'S COUNSEL]: No, I thought we reserved that rights [sic] against the hospital.

[DEFENSE COUNSEL]: They reserved their case against the hospital, but they just put on the record that they released Dr. Poccaccio [sic] and, as I understand it, your Honor, a release [as] to the agent releases the master.

[PLAINTIFF'S COUNSEL]: That's exactly why Counsel made the statement that he was reserving the rights against the hospital.

[DEFENSE COUNSEL]: They have a case against the – they plead a case against the hospital, but they've also plead a case for the hospital as the master of Dr. Poccaccio [sic], and I specifically asked the Personal Representative [] whether or not she released Dr. Poccaccio [sic] and she did, and so I don't think that there's any claim now by the Estate against the hospital for the actions of Dr. Poccaccio [sic], nor against Dr. Tiernan since he was never sued. Not Dr. Tiernan, excuse me – Dr. Lapuerta.

[PLAINTIFF'S COUNSEL]: We specifically reserved that, you Honor. Mention was made that we were, as to his acts, on behalf of the hospital, we were not releasing him as related to the hospital. I specifically stated that on the record.

[DEFENSE COUNSEL]: That was not made. They said they were reserving – the only time that came up, Judge, was when I asked about the confidentiality and they said that they wanted to bring up – they weren't releasing any – weren't maintaining confidentiality about the actions of the hospital which I, obviously, had no objection to. I specifically asked the Personal Representative whether or not she released Dr. Poccaccio [sic]. There was no objection at that time and Mrs. Vickers candidly admitted that she did. I don't think there's any debate about this, whatsoever.

THE COURT: I don't think there is either. Your request is denied.

<sup>3</sup> We do not disagree with the dissent's discussion of the law pertaining to releases and covenants not to sue. We also acknowledge that the word "release" was used in placing the settlement on record. However, we do not agree that the misunderstanding related only to the legal effect, and not the terms, of the agreement. As set forth in footnote 1, plaintiff was examined by her own attorney regarding the settlement. The word "release" was not mentioned, and the questioning made clear that the doctor, but not the hospital, would be dismissed. The word "release" was injected by defense counsel. To be sure, plaintiff's counsel should have been more alert to the use of the term. However, counsel was not reviewing a written document, and the colloquy took place in the context that the hospital was expressly retained in the suit. Plaintiff's counsel made this clear again when the confidentiality issue was raised. Plaintiff's failure to object to the use of the word "release" by defense counsel when plaintiff was questioned does not, in this context, mean that there was agreement as to the term.

STATE OF MICHIGAN  
COURT OF APPEALS

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ANNIE BEATRICE VICKERS, Personal  
Representative of the Estate of DELANSO  
JOHNSON, Deceased,

UNPUBLISHED

Plaintiff-Appellant,

v

ST. JOHN HOSPITAL and  
JOHN E. BOCCACCIO, M.D.,

No. 196365  
Wayne Circuit  
LC No. 94-409926 NH

Defendants-Appellees.

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Before: Holbrook, Jr., P.J. and White and R.J. Danhof,\* JJ.

DANHOF, J. (concurring in part and dissenting in part).

I concur with part III of the majority's opinion, but respectfully dissent from part II because I do not believe that the trial court erred in ruling that there was a valid release of Dr. Boccaccio and that the release operated to discharge the hospital from vicarious liability for any negligent acts by Dr. Boccaccio.

In *Theophelis v Lansing General Hospital*, 430 Mich 473, 480; 424 NW2d 478 (1988), our Supreme Court stated:

At common law a valid release of an agent for tortious conduct operates to bar recovery against the principal on a theory of vicarious liability, even though the release specifically reserves claims against the principal.

This common law doctrine is still recognized in Michigan and has not been changed by the statute governing rights of contribution. *Id.*; *Larkin v Otsego Memorial Hospital Ass'n*, 207 Mich App 391, 393; 525 NW2d 475 (1995). Thus, any release by plaintiff of Dr. Boccaccio would have the legal effect of discharging the hospital from vicarious liability for his negligent acts.

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Plaintiff argues that the settlement agreement with Dr. Boccaccio constituted a covenant not to sue, not a release. Unlike a release, a covenant not to sue with an agent does not discharge the principal. *Theophelis, supra* at 492. The difference between a release and a covenant not to sue was discussed in *Theophelis, supra* at 492, n 14:

A covenant not to sue is to be distinguished from a release in that it is not a present abandonment or relinquishment of the right or claim. It does not extinguish the cause of action. As between the parties to the agreement, the final result is the same in both cases. The difference is primarily in the effect as to third parties, and is based mainly on the fact that in the case of a release there is an immediate release or discharge, whereas in the other case there is merely an agreement not to prosecute a suit.

In the present case, plaintiff gave the following testimony when placing the terms of her settlement with Dr. Boccaccio on the record:

*Mr. Demczuk [Plaintiff's attorney]:* And are the terms of the settlement that, in exchange for compensation of \$10,000 to the Estate, you will dismiss Dr. John Boccaccio as a defendant in this case, only?

*Plaintiff:* Yes.

*Mr. Demczuk:* And you still have the right to proceed with your cause of action against the hospital?

*Plaintiff:* Right, yes.

*The Court:* Mr. Kenney, do you have any questions?

*Mr. Kenney [Defense counsel]:* Yes. Ms. Vickers, as the Personal Representative of the Estate, you understand that by releasing – by settling with Dr. Boccaccio you are releasing him from any and all liability, or of any and all claims that you or the Estate may or may have had against Dr. Boccaccio?

*Plaintiff:* Yes.

*Mr. Kenney:* And do you believe that, that releasing Dr. Boccaccio is in the best interest of the Estate, at this time, for the \$10,000?

*Plaintiff:* Yes.

*Mr. Kenney:* Do you understand that this, once and for all, ends any claim that you may have against Dr. Boccaccio for the claims of the death of Delanso Johnson?

*Plaintiff:* Yes.

The foregoing testimony does not indicate that plaintiff simply agreed to forego suing on an existing claim. On the contrary, the testimony reflects “a present abandonment or relinquishment” of plaintiff’s rights and claims against Dr. Boccaccio. Plaintiff expressly acknowledged that she was “releasing” Dr. Boccaccio of “any and all claims.” Thus, plaintiff’s settlement with Dr. Boccaccio is in the nature of a release rather than a covenant not to sue.

The majority concludes that the settlement agreement should be declared unenforceable for “lack of a meeting of the minds.” However, the record unambiguously reflects that the parties mutually understood, and intended, that plaintiff was “releasing” Dr. Boccaccio from “any and all liability” and “any and all claims.” The alleged misunderstanding in this case does not involve the intended *terms* of the agreement, but rather the *legal effect* of the agreement to release Dr. Boccaccio from liability. Any unilateral misunderstanding of the legal effect of the release does not abrogate the release. *Theophelis*, *supra* at 493; *Schmalzriedt v Titsworth*, 305 Mich 109, 119; 9 NW2d 24 (1943); *Wiersma v Nordella*, 260 Mich 574, 576; 245 NW 520 (1932); *Malone v SCM Corp*, 63 Mich App 11, 14; 233 NW2d 872 (1975).

Finally, I would decline plaintiff’s request to reform the release as a covenant not to sue. The burden of proof is upon the party seeking reformation of a written instrument. *River Rouge Bank v Fisher*, 372 Mich 558, 562; 127 NW2d 426 (1964). Absent a mutual mistake or a unilateral mistake coupled with fraud, shown by clear and convincing evidence, reformation is not warranted. *Theophelis*, *supra* at 492-493. Because plaintiff failed to show that the parties mutually intended to effectuate a covenant not to sue rather than a release, and because plaintiff has not made any showing of fraud, I would not reform the settlement agreement as a covenant not to sue.

In sum, I would affirm the trial court’s dismissal of Dr. Boccaccio pursuant to the release and settlement agreement, together with the trial court’s determination that the release of Dr. Boccaccio operated to discharge the hospital from vicarious liability for any negligent acts by Dr. Boccaccio. However, because there was evidence that other physicians may have committed malpractice, specifically Dr. LaPuerta, for which the hospital could be vicariously liable, I would reverse the trial court’s order granting a directed verdict for the hospital and remand for further proceedings.

/s/ Robert J. Danhof